SUBJECT INDEX TO PETITION FOR CERTIORARI

	Pages
Summary Statement of the matter involved.....	1 - 5
Reasons relied on for allowance of the writ	6 - 9
Prayer for Writ	10
Signature of Counsel	10

TABLE OF CASES CITED

	Pages
Consolidated Underwriters vs. Christal (writ refused), 135 S.W. (2) 127	7
Fidelity & Casualty Company of New York vs. Neas, 93 Fed. (2) 137	9
Gordon vs. Travelers Insurance Company, 287 S.W. 911	7
Middleton vs. Texas Power & Light Co., 108 Texas 96-109; 185 S.W. 556	6
Odom vs. Indemnity Insurance Company, 111 S.W. (2) 1143	7
Subdivision 5 of Section 1, Art. 8309, R. C. S.	6
Southern Casualty Company vs. Flores, 1 S.W. (2) 260	7
Thompson v. Erie Railroad	6
United States Casualty Co. vs. Vance, 91 S.W. (2) 465	7

In The

SUPREME COURT OF THE UNITED STATES

————Term, 1942

MASSACHUSETTS BONDING & INSURANCE COMPANY,
Petitioner.

VS.

MRS. E. S. MASSEY, ET AL, *Respondents*

PETITION FOR WRIT OF CERTIORARI.

May It Please The Court:

The petition of Massachusetts Bonding & Insurance Company respectfully shows this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a Workmen's Compensation case brought by respondents, Mrs. E. S. Massey for herself and three minor children, against petitioner, as insurance carrier for Royal Oil & Gas Corporation, who employed Massey, claiming

compensation by reason of the death of said Massey for alleged injuries received in the course of his employment.

Respondent alleged as a cause of action that Massey strained, over-exerted, and tore himself on August 31st, and that on November 15th he injured and strained himself and aggravated previous injuries, and on November 28th he further injured himself by working, and aggravated his previous injuries, and that near noon of November 29th, 1939, he died of syphilitic heart failure. Briefly, the evidence showed that on August 31st Massey, with a helper, carried some pipe, performed other light work through the day, quitting about 4:40 P. M. No evidence whatever showed he was strained or torn or damaged. He said he was tired after a usual day's work, and that night late he complained of feeling a choking sensation and took some alkaseltzer, and late in the night walked the floor some. Next day he got up, looked after his engine, rested practically all day, and that night he again had choking sensations, was examined by a doctor early in the morning of September 2nd, and sent to a hospital, later he went home and to bed until October 15th. He took over his job as pumper on the last named date. November 15th he assisted in directing work with reference to installing a cooler for the engine. There was no strain, or not even any work that day. He says that he had been instructed in no event to raise his hands above his head. He did his work on the lease and carried on his 24 hour duties as a pumper until his death, on the 29th of November. *On November 28th he had engine*

trouble, got a new head, and a man hired especially for the purpose put it on for him. Massey stayed on the job until about 11:30, went to bed, *and was up sometime before daylight*, had opportunity to work, and may be worked some that morning. He came in about seven, had breakfast, no complaint, went out to work again, came in about 11:15, sat and warmed himself, no complaint, went out for his car to go on to other work about 11:30, and a little later was found dead near his car.

Medical testimony for respondent showed that respondents' witness, Dr. Powers, was a heart specialist, and after examination about September 2nd, the other doctor referred the case to Dr. Powers. At that time Massey had a syphilitic heart of long standing three to ten years), that he "was ripe for death, work or no work;" "that the disease runs a definite, established course, and unless checked in its early stages, ends, in a given time, only in death; and that the doctor saw him too late, and that he was in such condition that even to interfere with his rest" was in effect an invitation to death.

At the close of the evidence petitioner requested a preemptory instruction (record, page 148), and asked specifically that if the case was to be submitted over plaintiff's request for instruction that the jury be limited to a consideration only of the last day and night's work. (see record, pp. 154-5).

The substance of the decision complained of is that the court holds:

> "It seems to be plaintiff's contention that there must be direct evidence that the death was caused by, that is, connecting the death with, a particular exertion or activity. This will not do. It is sufficient, if, taking all the facts and circumstances, there is a reasonable basis for the conclusion that in the course of his employment, there was an exertion, *the accidental and unlooked for result of which was a physical injury* to his heart, causing its failure and death."

And the court further held that,

> "The only thing the act requires is that the death or injury for which compensation is sought *be shown to be wholly or partly the result of some work or activity* connected with the employment and not the mere result of disease."

The above holdings are exactly contrary to both our Workmen's Compensation Statute and the decisions of our Supreme Court, in this: Our Workmen's Compensation Act defines injury as "harm or damage to the physical structure," and our Supreme Court has interpreted this to mean: (1) Such *injury* must have been *accidental;* (2) such injury must be capable of being traced to a definite time, place and cause; (3) if injury is alleged to have arisen from exertion or strain, it must be shown that such exertion or strain was not one to which the general public was equally exposed.

Again, the holding:

> "It is sufficient, if, taking all of the facts and circumstances, there is reasonable basis for conclusion that in the course of his employment, there was an exer-

> tion, the accidental and unlooked for results of which was a physical injury to the heart, causing its failure and his death,"

is contrary to our Workmen's Compensation Act in this: Our law covers only accidental injury. This opinion by the court makes it not only cover accidental injury, but any exertion, "the accidental and unlooked for results of which was a physical injury" (we had thought that results were never accidental), and still again the holding:

> "The only thing the Act requires is that the death or injury for which compensation is sought be shown to be wholly or partly the result of some work or activity connected with the employment, and not the mere result of disease,"

is contrary to all of our decisions in that the criterion laid down by the court that the only thing the act requires is that the injury be wholly or partly the result of some work or activity, while the settled law of our State is that it must be (1) accidental; (2) capable of being traced definitely to a time and place; and (3) that the exposure for injury by strain or exertion was not such as the general public is ordinarily exposed to. We believe, therefore, that the opinion of the Circuit Court is directly contra to the settled law as determined by the courts of this State.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Said Honorable Circuit Court of Appeals has rendered a decision repugnant to the Workmen's Compensation Act of Texas, and, contrary to the settled law of this State, has held that if there is a reasonable basis for the conclusion that in the course of employment there was an exertion, the accidental and unlooked for result of which was physical injury, that the same establishes a compensable injury, when our courts have repeatedly held that the injury must (1) be accidental; and (2) capable of being definitely located as to time, place and cause, and by so deciding the court has ignored the doctrine of *Thompson vs. Erie Railroad,*

We cite several opinions here that are contra to this case:

Subdivision 5 of Section 1, Art. 8309, R. C. S., is as follows:

> The terms "injury" and "personal injury" shall be construed to mean damage or harm to the physical structure of the body and such diseases or infection as naturally result therefrom.

This has been repeatedly construed by our Supreme Court to cover accidental injury only which may be located definitely as to time and place.

Middleton vs. Texas Power & Light Co., 108 Texas 96-109; 185 S.W. 556;

Gordon vs. Travelers Insurance Company, 287 S.W. 911;

United States Casualty Co. vs. Vance, 91 S.W. (2) 465;

Consolidated Underwriters vs. Christal (writ refused), 135 S.W. (2) 127;

Southern Casualty Company vs. Flores, 1 S.W. (2) 260.

II.

The Honorable Circuit Court of Appeals has decided that where syphilis has destroyed the valves and muscles of the heart so that deceased was ripe for death, work or no work, and was injured to such extent that even to interfere with his rest was in effect an invitation to death, and that where the deceased has done exactly the kind of work for years before the day charged, and after a rest period of six weeks he continued the same kind of work for a month and a half to his death, and the court allowed the respondents, after Massey's death, to choose three days and incidents in those days that could not be different from other days that he worked both before and after the incidents alleged, and choosing these particular days and incidents over a period of three months from the alleged injury, allowed the respondent to recover, which is contrary to our statutes and the settled law of this State, as decided in *Odom vs. Indemnity Insurance Company*, 111 S.W. (2) 1143 (see paragraph 5, pg. 1146, through the close of the opinion), and

contrary to all the cases holding that such accidents are traceable to a definite time and place.

III.

The Honorable Circuit Court of Appeals has held,

> "The only thing the Act requires is that the death or injury for which compensation is sought, be shown to be wholly or partly the result of some work or activity connected with the employment",

which holding is contrary to the decisions of our Supreme Court and the settled law of Texas, in that the Texas law requires (1) accidental injury (not that injury be the result of some work or activity connected with the employment); and (2) that same must be definitely traced to a time, place, etc.

IV.

Said Honorable Circuit Court of Appeals erred in rendering the decision it rendered, in that the evidence fails to show that the deceased was, even if he was injured by exertion, more exposed to hazards at the time than was the general public, which holding is in conflict with decisions of the Texas law.

V.

Said Honorable Circuit Court of Appeals has rendered a decision in conflict with its own decisions in many in-

stances, including *Fidelity & Casualty Company of New York vs. Neas*, 93 Fed. (2d) 137.

VI.

The Honorable Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable local decisions.

VII.

Said Honorable Circuit Court of Appeals has decided this particular case so that if its doctrine is applied generally to Workmen's Compensation cases in Texas it means that carriers of such compensation insurance provide health and life insurance in addition to the ordinary Workmen's Compensation Act that covers only accidental injuries, and such diseases or infections as naturally result from the injury.

VIII.

Said Honorable Circuit Court of Appeals erred in affirming the case and considering the testimony as to the incidents of August 31st and November 15th, because same were not admissible, and the jury should have been instructed not to consider same.

Petitioner accompanies this petition by a brief in support thereof, and also presents herewith a transcript of the record in the Circuit Court of Appeals.

WHEREFORE, your petitioner respectfully prays that writ of certiorari issue out of and under the seal of this Honorable Court directed to the Honorable Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a complete transcript of the record and all proceedings numbered and styled on its docket "No. 9777, Massachusetts Bonding & Insurance Company, Appellant, vs. Mrs. E. S. Massey, et al, Appellees" and that said judgment of the Circuit Court of Appeals may be reversed and rendered by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

WM. N. BONNER
Counsel for Petitioner.

BERT KING
Of Counsel for Petitioner.